83-1046

No.

IN THE

Supreme Court of the United States

GJERGJ GJIELI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent,

NICKOLA LULGJURAJ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

ZEFF LULGJURAJ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WARREN D. BRACY
1575 East Lafayette, Suite 201
Detroit, Michigan 48207
(313) 393-0047

LESLIE R. SEELIGSON
415 Detroit Street
Ann Arbor, Michigan 48104
(313) 995-1222

Attorneys for the Petitioner, Gjergj Gjieli

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTIONS PRESENTED

Gjergj Gjieli respectfully petitions that a Writ of Certiorari issue to review the Order of the Court of Appeals for the Sixth Circuit, entered in this proceeding on September 21, 1983.

1. Does 18 U. S. C. Section 201(b)(3) encompass bribery of a federal employee where the action sought to be influenced involves no federal or official function?

2. Is a case presented for exercise of the Court's supervisory powers by reversal of a conviction where the following acts occurred in the investigatory and law enforcement phase of a prosecution:

A] An Assistant United States Attorney prepared a simulated writ of habea corpus *ad testificandum* calling for the appearance of a state prisoner for purposes of a non-existent grand jury investigation; and

B] The same Assistant United States Attorney procured the signature of a United States District Judge on the writ without advising of its specious origin; and

C] A federal Alcohol, Tobacco and Firearms Agent impersonated a United States Marshall and used the simulated writ to remove the prisoner from state custody, in order to interrogate him at a remote location and thus to further the investigation and prosecution of a perceived bribery overture; and

D] The Record of this proceeding discloses that no sanctions against this egregious governmental misconduct were undertaken beyond a verbal admonition by the trial judge and a referral to the District Judge who was deceived into signing the specious writ of habeas corpus—who undertook no inquiry or action at all.

3. Does the prosecutorial use at trial of evidence gathered through the above acts violate the Defendants' rights to Due Process under the Fifth Amendment and a fair trial under the Sixth Amendment?

4. Does a finding of harmless error by the Sixth Circuit condone an injury to the judicial system, promote disrespect for the administration of justice and disrupt the mutual trust upon which comity of state-federal relations depends?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statute

IN THE

Supreme Court of the United States

GJERGJ GJIELI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent,

NICKOLA LULGJURAJ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

ZEFF LULGJURAJ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDERS BELOW

The Order of the Court of Appeals for the Sixth Circuit was issued on September 21, 1983. It is scheduled for publication. No citation is available. It appears in the Appendix hereto. The Order of the Court of Appeals denying rehearing issued on December 14, 1983. It appears in the Appendix hereto.

JURISDICTION.

The United States Court of Appeals for the Sixth Circuit affirmed Petitioner's criminal conviction by Opinion decided and filed on September 21, 1983. An Order denying rehearing was entered on December 14, 1983. On motion of Petitioner, this Court, per the Honorable Sandra Day O'Conner, extended the time for filing this Petition to December 20, 1983, by Order dated November 18, 1983. This Court's jurisdiction is invoked under 28 U. S. C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOKED

United States Constitution, Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment 6:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATUTORY PROVISIONS INVOLVED

18 U.S.C. Section 201 (a):

"(a) For the purpose of this section:

'public official' means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

'person who has been selected to be a public official' means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

18 U.S.C. Section 201(b)(3):

"(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

* * *

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

* * *

STATEMENT OF THE CASE

Petitioner appeals from a conviction for bribery of a federal official and conspiracy to bribe a federal officer. He was convicted following a jury trial conducted before the Honorable Horace W. Gilmore, United States District Judge, in the Eastern District of Michigan, Southern Division. Petitioner Gjieli was sentenced to terms of five years and fifteen years, to be served concurrently, on January 8, 1981. He was released on $125,000 bond pending appeal on April 13, 1981, by Judge Gilmore. On June 10, 1981, following the government's Motion to Revoke Bond, Judge Gilmore reduced the appeal bond to $70,000 and Gjieli remains free on that bond. The Court of Appeals for the Sixth Circuit affirmed Petitioner's conviction on September 21, 1983, the Honorable Pierce Lively dissenting. The Court of Appeals has stayed issuance of its mandate and appears to be considering Petitioner's request for rehearing.

The facts pertinent to this appeal are as follows. On August 22, 1980, a two count Indictment was returned against Appellant Gjieli and two co-defendants (Nickola Lulgjuraj and Zeff Lulgjuraj) charging them with conspiracy to bribe a federal Alcohol, Tobacco and Firearms agent by offering him payment with intent to induce the agent to violate his official duty and position by effecting the escape of Zeff Lulgjuraj from the custody of the State of Michigan [Court I, violation of 18 U.S.C. 371] and bribing the agent by offering him $100,000 [Count II, violation of 18 U.S.C. 201(b)(3)].

Petitioner and his co-defendants repeatedly raised a defense of "entrapment as a matter of law" throughout the trial court proceedings. The thrust of their defense was that pre-trial investigatory misconduct by the United States Attorney's office and the Alcohol, Tobacco and Firearms agents was so demonstrably improper and outrageous that the prosecution could not be permitted to stand as a matter of law. The District Judge consistently denied their presentation. Petitioner Gjieli filed his

"Motion for Judgment Not Withstanding the Verdict or in the Alternative for a New Trial" under Rule 33 of the Federal Rules of Criminal Procedure on December 3, 1980, but the docket does not reflect a disposition of this Motion, until administratively closed on January 13, 1981.

For the purposes of a full statement of facts, Petitioner adopts the Statement of Facts set out by Judge Kennedy in the Opinion of the Court of Appeals. [App. 1a-5a; pp. 1-5 of Slip Opinion]. The highlights of those facts are:

1] Petitioner is alleged to have sought to bribe a federal Alcohol, Tobacco and Firearms agent to break co-defendant, Zeff Lulgjuraj, out of state prison;

2] An Assistant United States Attorney prepared a simulated writ of habeas corpus for the appearance of Zeff Lulgjuraj before a non-existent grand jury investigation in order to show Petitioner that the Alcohol, Tobacco and Firearms agents could remove Zeff Lulgjuraj from custody.

3] This "ruse" was developed without the request or knowledge of any defendant and was intended to stimulate the defendants' interest in pursuing a bribery plan.

4] The Assistant United States Attorney procured the signature of a United States District Judge on the "writ" without revealing its purpose or specious origin.

5] Zeff Lulgjuraj was removed from state custody by an Alcohol, Tobacco and Firearms agent posing as a United States Marshall. He was taken to a remote location where he was interrogated and the agents suggested that his release could be secured by bribery.

6] Tape recordings of all contacts between the agents and the co-defendants were utilized at trial.

REASONS FOR GRANTING THE WRIT

This case presents two issues of continuing major significance to the federal judiciary and the administration of criminal justice. The narrower of the two issues requires construction of the appropriate scope and reach of 18 USC 201(b)(3). The broader issue questions the proper scope for exercise of the federal court's supervisory powers over law enforcement activity and thus requires an examination of the relationship between the judiciary and the executive branch of the federal government.

I.

The Sixth Circuit Opinion and Order Condones Flagrant Misconduct and Abuse of Office by an Assistant United States Attorney.

The use of judicial supervisory powers to curb governmental misconduct has frequently been before the Courts of Appeal and before this court in recent cases. There are at present no satisfactory guidelines by which the lower federal courts, the United States attorneys or defense counsel may be guided in assessing cases which come before them. The unique facts of this case present a clear cut opportunity for this court to establish workable and understandable rules for distinguishing truly intolerable conduct from merely objectionable behavior by law enforcement agents and government attorneys. Of course, on more personal terms, the court should issue the writ in order to reverse the convictions of Mr. Gjieli and his two co-defendants. These three men were convicted in the culmination of the most egregious and cynical abuse of investigatory, prosecutorial and judicial authority which this attorney has ever witnessed or read about.

In *Hampton* v. *United States,* 425 U. S. 484 (1976) and *United States* v. *Russell,* 411 U. S. 423 (1972) various members of this court suggested that certain levels of outrageous or

overreaching behavior by law enforcement officials could result in dismissal of otherwise valid criminal prosecutions. In *Russell,* Justice Rehnquist, writing for the court, expressly recognized this principle:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California,* 342 U. S. 165 (1952), ..."

Justice Rehnquist subsequently recognized the continuing viability of this principle in his plurality opinion in *Hampton* v. *United States,* 425 U. S. 484, 490 (1976):

> "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the Defendant . . ."

The Supreme Court was severely divided in its disposition of Hampton's argument that his conviction was barred as a matter of law by the use of governmental informants to *supply* the narcotics for the sales of which he was convicted. Three opinions were published, demonstrating the Court to be divided 3-2-3 in its approach to the doctrinal principles underlying Hampton's claim, but 5-3 in its decision that Hampton's conviction should be affirmed. In his concurring opinion Justice Powell, speaking for two Justices, expressly disclaimed any intention to delimit a due process based government overinvolvement defense:

> "Nor have we had occasion yet to confront Government overinvolvement in areas outside the realm of contraband offenses. Cf. *United States* v. *Archer,* 486 F. 2d 670 (CA 2 1973). In these circumstances, I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles." *Hampton, supra* at 493.

Mr. Justice Brennan, in dissent for three justices, also plainly recognized the continuing viability of a due process based defense:

> "In addition, I agree with Mr. Justice Powell that *Russell* does not foreclose imposition of a bar to conviction—based upon our supervisory power or due process principles where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be 'predisposed'." *Hampton, supra* at 497.

Hampton and *Russell* were construed by defense counsel to indicate that over involvement by law enforcement personnel in the development of criminal offenses could lead to dismissals—on grounds of "legal entrapment," generalized due process grounds or as a consequence of the judiciary's rather vague "supervisory powers." Numerous narcotics cases are prime examples. See e.g. *United States* v. *Leja*, 568 F. 2d 244 (6th Cir. 1977).

The ingenuity of law enforcement officials in developing "sting" operations whereby criminal opportunism may be uncovered and effectively prosecuted has produced a series of appellate decisions which appear to settle on the subjective fact-oriented definition of entrapment as a recognized legal defense. See e.g., *Sorrells* v. *United States*, U. S. 287, 435 (1932); *Sherman* v. *United States*, 356 U. S. 369 (1958). The "ABSCAM" prosecutions are particular examples. [See e.g., *United States* v. *Myers*, 692 F. 2d 823 (2d Cir. 1982); *United States* v. *Janotti*, 501 F. Supp. 1182 (E. D. Pa. 1980), *rev'd*, 673 F. 2d 578 (3d Cir) (en banc), *cert. den.* 102 S. Ct. 2906 (1982)]

This Court's most recent opinions in this area direct attention to the impact of the objected-to law enforcement activity on identifiable protected individual rights. While it is clear that the federal court's general supervisory powers include the authority to remedy and deter serious misconduct by the government in the investigation and prosecution of a criminal

defendant, reversals of convictions are said to be approached "with some caution." *United States* v. *Payner*, 447 U. S. 727, 734 (1980). Further, in *United States* v. *Hastings*, ____ U. S. ____; 51 U. S. L. W. 4572 (U. S. 5/23/83), this court suggested that supervisory powers ought to be directed toward disciplinary measures, rather than reversals of convictions. It appears that this Court's view of harmless error in *Hastings* was central to its disposition of the case:

> "Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since by definition, the conviction would have obtained notwithstanding the asserted error." *Hastings*, ____ U. S. at ____, 51 U. S. L. W. at 4574.

This apparent guideline was picked up by Judge Cornelia Kennedy in this case [App. 19a; Slip Opinion, page 19] Unfortunately [in the view of the Petitioner], she severely misconstrued the facts of the case and thus avoided the most significant issue presented. Frankly, her assertion that "None of the governmental activity with respect to the writ of habeas corpus incident violated any protected rights of the defendants." [App. 21a; Slip Opinion at 21] is suspect. The execution of a bogus writ of habeas corpus most clearly infringed on Zeff Lulgjuraj's residual liberty rights.

Hastings involved prosecutorial misconduct before the trier of fact. This case does not. Here, the prosecutor involved himself in the investigatory phase of this prosecution and invoked both grand jury and judicial authority (without authority to do so) in order to advance the investigation of a perceived bribery attempt. His misconduct is conceded. However, it occurred outside the court room and, as a consequence, *Hastings* does not seem directly applicable.

Dismissal of this prosecution and conviction is a drastic remedy. Nevertheless, it is the only effective remedy whereby the prosecution excesses may be curbed. The routine utilization of writs *ad testificandum* requires that all parties be able to rely

on the regularity and propriety of the process. It is apparent that the United States Attorney for the Eastern District of Michigan regards the ficticious issuance of grand jury process to be a valid investigatory device [Appendix page 38a]. In fact, the inference may be taken that the Chief Judge of the district has acquiesced in this co-mingling of judicial and enforcement powers.

II.

The Sixth Circuit Opinion and Order Expands Federal Criminal Jurisdiction Beyond the Intent of Congress and Beyond Appropriate Federal Policy and Interest.

The construction of 18 U. S. C. 201(b)(3) presents a straight forward issue. If the Sixth Circuit Opinion is permitted to stand, bribery of any federal employee becomes a federal crime—regardless of the focus of the bribe. This construction is contrary to *United States* v. *Birdsall,* 233 U. S. 223 (1914) which construed the predecessor statute to Section 201. *Birdsall* clearly construed federal bribery legislation to address the subversion of an official act, duty or function.

Petitioner relied more directly on *Blunden* v. *United States,* 169 F. 2d 991 (6th Cir. 1948) for its holding that the Federal Bribery Statute was not violated unless the focus of the bribe was to influence a federal official in his official act or duty. The alleged recipient of the bribe in the instant case had no official authority or duty with respect to custody of state prisoners. Petitioner finds support for his position in *United States* v. *Seagraves,* 100 F. Supp 424 [D. C. Guam 1951] and *Krogmann* v. *United States,* 225 F. 2d 220 (5th Cir. 1955).

The majority opinion in the Sixth Circuit notes there are no Sixth Circuit or Supreme Court opinions addressing Section 201(b) since the 1962 amendments to the statute. Accordingly, the Court concluded that it was not bound by either *Blunden, supra* or *Birdsall, supra.* It therefore construed Section 201(b) to broadly address attempted subversion of federal officials

regardless of the focus of the bribe. On the contrary, Judge Lively's dissent goes beyond the majority opinion to point out that bribery cases consistently require that the bribe or offer be in connection with the federal official's line of duty [Appendix page] *Schneider* v. *United States,* 192 F. 2d 498 (9th Cir. 1951), *cert. den.,* 343 U. S. 914 (1952).

The majority opinion effectively expands the scope of Section 201(b) beyond any range of federal interest. The defendants here were subject to prosecution under pertinent state legislation. There being no federal function or duty involved here, there appears to be no valid federal interest in asserting jurisdiction. Further, there was no apparent congressional intent to broaden this aspect of federal criminal jurisdiction in the 1962 recodification of the bribery statute. The limitations of the statute must be clarified.

CONCLUSION

The issue of the exercise of a federal court's supervisory powers to curb governmental misconduct and excess has previously been before this Court. The District and Circuit Court orders show that more precise and directive guidance is required. Condonation of the behavior of the United States Attorney's office in this case will inevitably promote disrespect for the administration of criminal justice. Further, it will predictably encourage and generate future misconduct of the type seen here. The Court of Appeals deference to "harmless error" is dangerous and cynical. Only a strong and unmistakable sanction—reversal of this conviction—will deter repetition.

The construction of the Federal Bribery Statute is of broad significance to future exercise of the federal criminal jurisdiction. If permitted to stand, the Sixth Circuit construction expands federal bribery legislation far beyond its historical scope, and beyond any apparent intent of Congress.

Therefore, it is respectfully prayed that this Court grant a writ of certiorari, reverse the conviction below and order the prosecution dismissed.

Respectfully submitted,

WARREN D. BRACY
1575 East Lafayette, Suite 201
Detroit, Michigan 48207
(313) 393-0047

LESLIE R. SEELIGSON
415 Detroit Street
Ann Arbor, Michigan 48104
(313) 995-1222

Attorneys for the Petitioner,
Gjergj Gjieli

APPENDIX

Nos. 81-1087, 1088, 1089

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GJERGJ GJIELI (81-1087),
NICKOLA LULGJURAJ (81-1088),
ZEFF LULGJURAJ (81-1089),
Defendants-Appellants.

APPEAL from the United States District Court, for the Eastern District of Michigan, Southern Division.

Decided and Filed September 21, 1983

Before: LIVELY and KENNEDY, Circuit Judges; and WILHOIT,* District Judge.

KENNEDY, Circuit Judge, delivered the opinion of the Court in which WILHOIT, District Judge, joined. LIVELY, Circuit Judge (pp. 23-32), filed a separate dissenting opinion.

KENNEDY, Circuit Judge. Defendants Gjergj Gjieli, Nickola Lulgjuraj and Zeff Lulgjuraj appeal from their jury convictions of bribery of a public official, 18 U.S.C. § 201(b)(3), and

---

* Honorable Henry R. Wilhoit, Jr., United States District Court for the Eastern District of Kentucky, sitting by designation.

conspiracy to bribe a public official, 18 U.S.C. § 371. All three argued in the District Court and assert on appeal that the acts charged in the indictment and described by the evidence did not constitute a violation of 18 U.S.C. 201(b) (3) because it was not within the scope of the official authority of the bribed official to effect the object of the bribe. Second, the defendants urge reversal under the due process clause and the Court's supervisory powers because of certain misbehavior by the government in the investigation and prosecution of the charges. We find that the defendants' acts violated the statute. The misbehavior of the government, although serious, does not warrant dismissal of the charges. We, therefore, affirm the convictions.

I.

The transcript of the trial, including taped conversations, reveals an unusual tale. Robert Van Hengel, an agent of the Bureau of Alcohol, Tobacco and Firearms of the United States Treasury Department (ATF), was a regular customer at a bar in Detroit where one of the defendants, Gjergj Gjieli, was employed as a bartender. Gjieli was interested in purchasing a short wave radio set from Van Hengel. On June 11, 1980, during negotiations over the radio which Gjieli agreed to purchase, Gjieli suddenly told Van Hengel that he had $100,000 for him, plus the biggest present he had ever received. When questioned, Gjieli wrote the name "Zef [sic] Lulgjuraj" on a slip of paper and handed it to the agent. Gjieli then stated that Lulgjuraj was in the State Prison of Southern Michigan at Jackson, Michigan, (SPSM or Jackson) and that "his people" wanted him out so he could return to his homeland, Albania.[1] Van Hengel warned Gjieli that such an offer to a federal agent could get him in serious trouble. Gjieli never-

[1] Lulgjuraj was serving four life sentences, three for murder and one for attempted murder imposed by a Michigan state court.

theless suggested that Van Hengel might have contacts and perhaps could arrange a break-out or transportation for Lulgjuraj who could escape at some unguarded moment. Van Hengel told Gjieli that he would have to think about the matter and would contact him later.

The next day Van Hengel reported the conversation to his supervisor in the Detroit office of ATF. On June 13, Van Hengel met with Special Agent Jim Covert of ATF Internal Affairs and a detective sergeant of the Michigan State Police. On June 16, Van Hengel met with Covert and the Michigan State Police sergeant as well as an FBI agent.[2] Van Hengel was fitted with a body recorder and a radio transmitter at this meeting. A short time later Van Hengel went to the bar and engaged Gjieli in conversation which was secretly taped. Gjieli assured Van Hengel that the $100,000 would be "cash on the line." A test run was discussed, with Van Hengel suggesting that Lulgjuraj would be "moved around a little bit to show what we can do." Van Hengel again requested time to think over Gjieli's proposal.

On July 10, after several weeks in which he had no contact with Gjieli, Van Hengel returned to the bar with another ATF agent. A bartender told Van Hengel that Gjieli no longer worked at the bar having quit to return to Albania with his parents. Van Hengel returned to the bar the next day to get Gjieli's telephone number, but the bartender had not located it. On July 13, Van Hengel again went to the bar. Neither the bartender nor the owner of the bar was able to supply Gjieli's telephone number. Efforts to locate Gjieli over the next few days proved futile.

On July 18, Van Hengel and Covert met with an Assistant United States Attorney. It was agreed that a "ruse" was needed to signal Gjieli that Van Hengel was ready to deliver.[3]

---

[2] The FBI subsequently declined an invitation to participate in the investigation.

[3] In describing the "ruse" to the grand jury which indicted the de-

To effect the "ruse" the Assistant United States Attorney presented a request for a writ of habeas corpus *ad testificandum* to a federal District Judge, representing that Zeff Lulgjuraj was a witness in an arson case and that he would be taken from Jackson State Prison to appear before a federal grand jury in Detroit which was investigating the arson. In fact there was no such arson investigation by a grand jury at that time, and there was no plan to take Lulgjuraj into Detroit. Unaware of the deception, the District Judge signed the writ. An ATF agent took the writ to the SPSM on July 22. The agent posed as a Deputy United States Marshal and obtained custody of Lulgjuraj for the pretended purpose of taking him before a federal grand jury. A group of ATF agents and marshals then took the prisoner to the Jackson Municipal Airport where Van Hengel was waiting in an unmarked Michigan State Police car.

Van Hengel got into the car with Lulgjuraj and initiated a conversation about "George," the bartender at De Luca's Bar. Lulgjuraj responded that he knew him and had last talked to him "about 5, 6 months, 5 months." He said he knew nothing of any conversation between Van Hengel and George. Van Hengel suggested that the next time Lulgjuraj talked with Gjieli, "You tell him we had you out. This was my idea to get you here. Just tell him the guy he talked to in the bar, in De Luca's, we had you out. Airplanes were here. OK?" When Van Hengel mentioned "the hundred thousand," Lulgjuraj revealed no apparent knowledge of Gjieli's offer to Van Hengel. When asked specifically if "the hundred thousand is there," Lulgjuraj replied, "I believe so. If he told you that, that's you know, regarding help me, something." Lulgjuraj told Van Hengel to call his home and ask for his son Nick. The meeting ended with Lulgjuraj promising to call his son

---

fendants, Agent Covert said. "Things got a little quiet, so we decided to do something that would offer an opportunity to these people to either do their thing or not do their thing, to see whether or not they were continuing."

Nick to tell him to get in touch with Van Hengel either that night or the next day.

Van Hengel received a telephone call from Nick Lulgjuraj later on July 22 and returned the call the next day. After talking with Nick, Van Hengel received a call from Gjieli who said he was returning to Detroit on July 24. Late in the afternoon of the 24th Van Hengel and another ATF agent met Gjieli and Nick Lulgjuraj at a motel in Detroit and discussed the payment of $10,000 "front money." The same evening Gjieli and Nick delivered $10,000 in currency to the agents. Both meetings were taped on hidden recorders. By prearrangement Nick Lulgjuraj delivered $90,000 in currency to Van Hengel at a motel room in Detroit on August 5. After monitoring the meeting and determining that the delivery had been made, Agent Covert entered the room and arrested Nick Lulgjuraj. Gjieli was arrested the same day in New York.

On August 25, 1980, a federal grand jury in Detroit indicted Gjergj Gjieli, Nick Lulgjuraj and Zeff Lulgjuraj of conspiracy to bribe and bribery of a public official.[4]

Defendants assert that it is not a federal offense to offer or to pay a bribe to an official of the United States for the performance of an act which would violate state law but which does not violate a statute of the United States and is not a part of an official duty. Because Van Hengel had no duty with respect to the custody of a state prisoner and could not use his official position to effect the escape of Zeff Lulgjuraj the defendants contend that the statutory elements of § 201(b)(3) cannot be satisfied.[5] We disagree.

---

[4] The substantive count charged that the three defendants did "corruptly give, offer and promise a thing of value, that is: One Hundred Thousand Dollars ($100,000.00) to Special Agent Robert Van Hengel, ATF, a public official, with intent to induce him to do an act in violation of his duty; that is, to use his knowledge, influence and official position to effect the escape of Zeff Lulgjuraj from the lawful custody of the State of Michigan Department of Corrections; all in violation of Section 201(b)(3), Title 18, United States Code."

[5] We have accepted for the sake of statutory analysis the defendants' assertion that Van Hengel could not have accomplished the

Statutory Requirements of Section 201(b)(3) Violations

Title 18 U.S.C. § 201 provides in pertinent part:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official . . . with intent–
>
> (1) to influence any *official act; or*
>
> • • •
>
> (3) to induce such public official . . . to do or omit to do any action in violation of his *lawful duty;*
>
> • • •
>
> (e) . . . . Shall be fined . . . or imprisoned . . . or both, and may be disqualified from holding any office of honor, trust, or profit under the United States. (emphasis added)

The defendants in the present case were indicted and convicted of violating subsection (3) of § 201(b).

Three statutory elements must be satisfied to establish a § 201(b)(3) violation. First, the bribed individual must be a "public official" (or other person named in the statute). Second, the briber must directly or indirectly, corruptly give, offer or promise something of value to a public official. Third, in doing so, the briber must have the intent to induce the public official to act in violation of his lawful duty. 18 U.S.C.

---

purposes for which he was bribed through his official position. This assertion is, however, only arguably true. Clearly Van Hengel could not *legally*, within his official capacity, have arranged the escape of Zeff Lulgjuraj. Yet no official, either state or federal, could have *legally* accomplished such a goal. The real question is whether Van Hengel could have used his official position in *any* way to effectuate the desired escape. The ease with which Van Hengel and the Assistant United State Attorney succeeded in gaining Lulgjuraj's release on a writ demonstrates that it may have been possible for Van Hengel to have *actually* procured Lulgjaraj's escape through use of Van Hengel's status as a federal officer.

§ 201(b)(3). The indictment and the evidence at trial set forth and established each of these elements.

A. Public official requirement

The definitional section of the statute, § 201(a), states:

> (a) For the purpose of this section:
>
> 'public official' means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and
>
> 'person who has been selected to be a public official' means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and
>
> • • •

The indictment in this case satisfies this definition of a "public official" because Van Hengel is a regular *employee* of the Bureau of Tobacco, Alcohol and Firearms, a division of the Department of Treasury.

The dissent accepts the defendants' contention that the phrase "in any official function" in § 201(a) modifies not only persons who are "acting for or on behalf of the United States" but also "officers" and "employees." Accordingly, because Van Hengel's official function as an ATF agent did not include any authority over state prisoners, the dissent would not find Van Hengel to be a "public official" under § 201(a).

Contrary to the dissent's view, we conclude that § 201(a) imposes no requirement that a bribed "employee" be acting in 'any official function" before the "public official" requirement may be satisfied. Rather, the phrase "in any official function" was intended to modify only "person acting for or on behalf of the United States . . ." and not officer or employee. *Hurley* v. *United States*, 192 F.2d 297, 299 (4th Cir. 1951); *Nordgren* v. *United States*, 181 F.2d 718, 720-21 (9th Cir. 1950). *See also United States* v. *Raff*, 161 F. Supp. 276, 280 n.3 (M.D. Pa. 1958).

Several considerations dictate this construction of the statute. First, unless the phrases "officer and employee" and "any persons acting for or on behalf of the United States" are read in the disjunctive, the words "officer" and "employee" are superfluous. The Fourth Circuit correctly recognized this in *Hurley*.

> To hold otherwise would be to make the words 'officer and employee' completely nugatory.
>
> • • •
>
> If Congress had intended that an officer or employee must be acting in an official function to violate § 201, why were the words 'officer or employee' inserted in the statute? The term 'person acting for the United States in an official function' is broad enough to include officers and employees. We do not believe that Congress so intended, but rather a distinction was drawn between officers or employees on the one hand, and persons acting for the United States in an official function on the other. Statutes must be interpreted as to give meaning to every portion thereof.

Hurley, 192 F.2d at 300.

Second, this reading of the statute is more consistent with the legislative purpose of preventing the corruption of a federal official. *See Kemler* v. *United States*, 133 F.2d 235,

238 (1st Cir. 1942). The potential for corruption occurs when bribes are offered to federal employees with the intent that the employees use their federal office or position in an unlawful manner. For persons who are not federal employees the potential for corruption is limited to when they are acting "for or on behalf of the United States . . . in any official function."

Third, this distinction is recognized in § 201(a)'s limited legislative history:

> The term "public official" [was] broadly defined to include officers and employees of the three branches of government, jurors *and other persons carrying on activities for or on behalf of the Government.* (emphasis added)

S. Rep. No. 2213, 87 Cong., 2d Sess. (1962) reprinted in [1962] U.S. Code Cong. & Ad. News 3852, 3856.

Fourth, § 201(b) clearly does not provide any limitation of "official function" with respect to a "person who has been selected to be a public official." Yet, such an individual has no authority to perform any official duties until actually appointed. It would be strange indeed that it is a crime to offer a bribe to one who has been selected for appointment but not a crime to offer the same bribe after appointment when the individual is actually an officer or employee of the government.

The dissent's construction of § 201(a) in effect adds an element to the crime through the statutory definition of public official; that is, that the bribed federal employee has the actual authority to achieve the object of the bribe. This is a position rejected by the Second, Seventh, Fourth, Fifth and District of Columbia Circuits which have all imposed § 201 liability on bribers who erroneously perceived that the duties of a public official would give that official the authority to accomplish the desired act. *United States* v. *Arroyo,*

581 F.2d 649 (7th Cir.), *cert. denied*, 439 U.S. 1069 (1978) (201(c)); *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978) (201(c)); *United States* v. *Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975) (201(b)); *United States* v. *Hall*, 245 F.2d 338, 339 (2d Cir. 1957); *United States* v. *Troop*, 235 F.2d 123, 124-25 (7th Cir. 1956) (201(b)); *Wilson* v. *United States*, 230 F.2d 521 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956); *Hurley*, 192 F.2d at 299 (4th Cir.); *United States* v. *Lubomski*, 277 F.Supp. 713 (N.D. Ill. 1967).

The defendants contend that *Blunden* v. *United States*, 169 F.2d 991 (6th Cir. 1948), a case decided prior to the 1962 amendments to § 201, is dispositive of this issue. While language in *Blunden* does in fact support the defendants' contentions, we are not persuaded that such language controls our construction of the *present* revision of § 201(b).

The 1948 revision of § 201(b) considered by the *Blunden* court made no clear distinctions between the alternative ways in which one could violate the statute. This and former versions of § 201, by consolidation of the operative and definitional provisions of the statute in a single sentence marked off only by commas, permitted confusion between the definitional and operative provisions.[4] This is manifested in the language used in earlier cases.

---

[4] From 1948 to 1962, 18 U.S.C. § 201 provided:

> § 201. Offer to officer or other person
>
> Whoever promises, offers, or gives any money or thing of value or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in

Neither the Supreme Court nor the Sixth Circuit has addressed § 201(b) since amendments to this statute were made in 1962. The amendments to the statute clarify that certain provisions appearing in former versions of the statute are definitional and others operative. The terms "public official," "person who has been selected to be a public official," and "official act" are clearly set forth in § 201(a) as definitional provisions. In addition, the operative provisions of § 201(b)(1), (2) and (3) are now clearly set forth as three alternative means by which the statute can be violated. Only one of these alternatives, subsection (1), requires by its terms that the bribery concern some "official act."

The defendants in *Blunden* were charged under the 1948 act with the parallel of the 1962 subsection (1) violation; that is, offering things of value to a known employee of the United States "with the intent to influence his decision or action in a matter of proceeding within . . . his official capacity . . . ." 169 F.2d at 993. Blunden and others wished to purchase surplus motors from the Army. Flisek was the chief civilian clerk at the depot where the motors were stored. He had authority to move some motors at the depot to other posts or stations in the United States but no authority to ship surplus motors. However, he told defendants he would see that they got a preference over other buyers in the sale of the motors. Defendants agreed that Flisek would get an equal share of the profits from motors obtained through his efforts. He also arranged to secure forms and made out a false bill of lading. Later he had the transportation division of the depot ship and bill additional motors to defendants. The information charged defendants "with giving

---

committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years or both.

to Flisek, knowing him to be an employee of the United States of America, certain things of value with the intent to influence his decision or action in a matter or proceeding within the jurisdiction and control in his official capacity as [chief clerk]." *Id.* at 933. The Court held that since Flisek "lacked the authority and jurisdiction to act" in the sale of the motors the statute was not violated, even though Flisek's position gave him the opportunity to ship government property illegally. The *Blunden* Court noted that defendants could successfully have been charged under the same section — but were not — with the intent to influence Flisek to commit a fraud on the United States. That statement makes it clear the Court was not relying on any failure to meet the *public official* definition because of an "official function" limitation. Such a limitation on the definition of public official would have prevented prosecution for fraud as well.

The *Blunden* Court was, therefore, never faced with the issue of whether the federal employee involved was a "public official" as now defined in § 201(a). Indeed, such official status appears to have been assumed. Rather, the Court dismissed the charges because the government failed to prove the offense charged. Since the employee had not been bribed to act on a matter within his official capacity, the defendants' conviction for bribing a public official with intent to *influence an official decision* could not stand.

The defendants in the present case were not indicted for bribing a public official with intent "to influence an official act" within the public official's official capacity. Instead, they were indicted for bribery to induce a public official to violate his lawful duties. There is simply no requirement here that the act induced fall within the federal employee's official function. *Blunden* does not hold otherwise.

Nor is *Birdsall* v. *United States*, 233 U.S. 223 (1914), also decided before the 1962 amendments to § 201, contrary to our construction of the present statute. *Birdsall*, like *Blunden*,

is also an "official act" case which would not now be brought under § 201(b)(1).

In *Birdsall*, the Supreme Court addressed whether gifts made to and received by officers in the Department of Indian Affairs, for the purpose of influencing reports and recommendations to federal judges with regard to sentences of persons convicted for violating the liquor laws, constituted bribery. The then effective version of § 201, with respect to the acceptance of bribes, provided that:

> [W]hoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof, [accepts money] with the intent to have his decision or *action* on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, [shall be punished as stated]. (emphasis added)

Birdsall, 233 U.S. at 230. Another provision, as to offering a bribe, used language similar to that quoted above in defining the official "action" of the recipient and the character of the action intended to be influenced. The bribe offering statute continued the intent requirement, as does the present version of § 201(b), with two additional types of criminal intent "[to i]nfluence him to commit . . . any fraud . . . on the United States or to induce him to do or omit to do any act in violation of his lawful duty." *Id.* at 230. The indictments charged Birdsall with having given money to two officers in the Department of Indian Affairs with intent to influence their official "action," the first of the three types of criminal intent under the then effective version of § 201. The federal officers were charged with receiving money from Birdsall with the intent that their official "action" should thus be influenced. The Supreme Court in *Birdsall* clearly relied

on the criminal intent alternative in what is now § 201(b)(1) with respect to Birdsall and § 201(c)(1) with respect to the two federal officers. It repeatedly referred to "action" in the body of the opinion. In addition, the indictment only charged the defendants with the "action" alternative of criminal intent. In the then effective version of § 201, "action" was not preceded by a qualifying term "official" as it is now. The present version of § 201(b)(1) and 201(c)(1) substitutes the term "official act." The Supreme Court in *Birdsall* read the then effective version of § 201 to require that "action" be qualified by the implied term "official." *Id.* at 230 ("[E]very action that is within the range of official duty comes within the purview of these sections."), *Id.* at 235 ("In determining the scope of official action regard must be had to the authority conferred . . ."). The Court went on to conclude that "official action" need not be proscribed by statute, but may include a requirement of the department for which the public official is acting and may be evidenced by established usage as well as written rules and regulations. *Id.* at 231.

The Supreme Court's judicial qualification of "action" as "official action" was codified in subsequent versions of § 201 in the language "official act," and is presently found in § 201 (b)(1), as defined in § 201(a) ("official act"). The end result of *Birdsall* was that the Court held that the reports and recommendations made by the federal officers were "official actions," within the meaning of the first of the alternative intent provisions of the then effective § 201, even though the reports and recommendations were not required by statute. *Id.* at 229. *Birdsall*, therefore, did not resolve the question of statutory construction presented in the instant case and is not controlling.

B. The requirement of a promise, gift or offer of something of value to a public official

The indictment alleged that defendants gave $100,000 to Van Hengel. This second requirement is clearly satisfied and is not an issue in this case.

C. Intent to induce the public official to act in violation of his lawful duty

The third requirement for a § 201(b)(3) violation is that the briber have the intent to induce the public official to act in violation of his lawful duty.

1. *Intent:* Van Hengel was approached by the defendants because he was a government employee and because they erroneously perceived that he had the power to effect the release of Zeff Luigjuraj from state prison as a result of that status. Although erroneous, defendants' beliefs satisfy the intent requirement of § 201(b)(3). This provision encompasses both an intent to induce acts which are part of a public official's lawful duties and those acts which are erroneously perceived by the briber to be part of the public official's lawful duties.

In *Blunden* this Court held that a § 201(b) violation may not be found where the bribed public official has no actual authority to compel the desired result. The defendants urge that this holding construes § 201(b)(3) to require that the bribe giver's intent to corrupt be based on a correct perception of the public official's authority. We disagree. As discussed in the previous section of this opinion, the only consideration before the *Blunden* court was whether the defendants had, under what would now be § 201(b)(1), corrupted a public official in the performance of an *official act*.[7]

[7] Indeed, the author of *Blunden* apparently considered that the facts before the Court presented a simple case of theft of government property — an act manifestly beyond a public official's authority to perform. *See Krogmann* v. *United States*, 225 F.2d 220, 225 (6th Cir. 1955).

The Sixth Circuit retreated from any contrary implication drawn from the holding of *Blunden* in a subsequent opinion written by *Blunden's* author.

In *Krogmann* v. *United States*, 225 F.2d 220, 225 (6th Cir. 1955) the Court held that § 201 was applicable where the advice and recommendation of a public official would be influential even though the public official did not have the authority to make the final decision. Indeed, *Krogmann* explicitly recognized that it was the intent of the briber which was controlling. The defendant in *Krogmann* claimed that there was insufficient evidence to establish that the defendant public official had authority over the property which was to be sold as surplus. After reviewing the evidence, the Court explained that the *briber's intent to corrupt* and not achievement of the desired result was the controlling consideration:

> In addition, the offense charged was complete upon the payment of the money to [the bribee] with the intent to influence his action with respect to the sale of surplus property. The evidence was sufficient to show that appellants were interested in the surplus property at Oak Ridge and made the payments for the purpose of influencing [the bribee's] action with respect to such property. Whether the attempt was successful or what the officer did in attempting to perform his side of the bargain are accordingly immaterial. Wolf v. United States, 6 Cir., 292 F. 673, 675; Curtis v. State, 113 Ohio St. 187, 191, 148 N.E. 834; Underhill on Criminal Evidence, 4th Edition, Sec. 715.

In light of *Krogmann*, the absence of any reasoned analysis on the issue in *Blunden* and the 1962 amendments to the statute, we believe we are free to consider this issue now.

Congress enacted § 201(b) to provide a broad deterrent against attempted corruption of public officials by means of bribes. The focus of this section is upon the briber's intent

to corrupt, not upon prevention, per se, of the briber's ultimate ends, or upon the bribed individual's ability to effect a result. Because the briber's intent is controlling, it is irrelevant whether that intent was correctly formulated. To limit § 201(b)(3) in the manner suggested by the defendants would excuse bribers of public officials who fully intended to gain an advantage by making a corrupt offer to a public official but were mistaken in their impression of what the public official could lawfully do.[8] The deterrent value of punishing the bad intent of bribers is the same regardless of whether or not the acts to be accomplished are within the scope of the actual lawful duties of the bribed public official and regardless of whether the briber has correctly perceived the precise scope of the official's lawful duties.

For these reasons we choose to follow the reasoning of the Second, Seventh, Fourth, Fifth and District of Columbia Circuits, all which have imposed § 201 liability on bribers who erroneously perceived that the bribed public official had the authority to accomplish the desired act. *United States* v. *Arroyo*, 581 F.2d 647 (7th Cir.), *cert. denied*, 439 U.S. 1069 (1978) (201(c)); *United States* v. *Evans*, 572 F.2d 455, 480 (5th Cir.), *cert. denied*, 438 U.S. 870 (1978) (201(c)); *United States* v. *Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 991 (1975) (201(b)); *United States* v. *Hall*, 245 F.2d 338, 338-339 (2d Cir. 1957); *United States* v. *Troop*, 235 F.2d 123, 124-25 (7th Cir. 1956)(201(b)); *Wilson* v. *United States*, 230 F.2d 521 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956); *Hurley, supra*, (4th Cir.); *United States* v. *Lubomski*, 277 F.Supp 713 (N.D. Ill. 1967).

2. *Lawful duties:* Van Hengel was given $100,000 by defendants to effect the escape of Zeff Lulgjuraj from state

[8] This does not mean that every inducement given to a public employee to perform some illegal act will necessarily constitute bribery under § 201(b)(3). To the contrary, the briber must still have intended that the federal employee utilize that employee status to accomplish the illegal goal. It is here that the evil of potential corruption of public officials occurs.

prison, an act that would constitute a violation of Mich.Comp. Laws Ann. § 750.1.

In *Birdsall* v. *United States*, 233 U.S. 223 (1914), the Supreme Court stated that lawful duties and official acts extend beyond those imposed by statute to include duties and acts imposed by written rules and regulations. *Id.* at 231.

The violation of this Michigan criminal law by Van Hengel would constitute a violation of his lawful duties not to engage in criminal conduct, 31 C.F.R. §§ 0.735-56, 0.735-30(f), and to uphold the laws of all governments within the United States, 28 C.F.R. § 45-735 (Appendix – Code of Ethics for Government Service, ¶ 2). The regulations authorize disciplinary sanctions against employees who violate them – sanctions which affect their employment.

The indictment in this case satisfied all of the requirements imposed by the plain language of the present version of § 201(b)(3).

II. Supervisory Powers and Due Process Violation:

All these defendants assert that their convictions should be barred under due process principles or in the exercise of this Court's supervisory powers because of the nature and extent of the involvement of the government in the bribe scheme.[9]

In particular, defendants urge that the conduct of the Assistant United States Attorney in deceiving the United States District Judge and the ATF agents in impersonating a United States Marshal before Michigan prison authorities as well as certain remarks of the prosecutor before the grand jury were so outrageous as to require reversal.

This Court's inherent power to supervise the administration of criminal justice, *McNabb* v. *United States*, 318 U.S.

[9] While defendants Gjieli and Nickola Lulgjuraj asserted entrapment defenses at trial, Zeff Lulgjuraj did not for apparent tactical reasons. The jury's rejection of these defenses is not in issue.

332, 340 (1943), permits it to "formulate procedural rules not specifically required by the Constitution or by Congress." *United States* v. *Hastings*, 51 U.S.L.W. 4572, 4574 (U.S. May 23, 1983), Slip Op. at 6. The exercise of such supervisory powers serves three basic purposes.

> [1] [T]o implement a remedy for violation of recognized rights, *McNabb*, *supra*, 318 U.S. at 340; *Rea* v. *United States*, 350 U.S. 214, 217 (1956);
>
> [2] To preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, *McNabb*, *supra*, 318 U.S. at 345; *Elkins* v. *United States*, 364 U.S. 206, 222 (1960)
>
> [3] And finally, as a remedy designed to deter illegal conduct, *United States* v. *Payner*, 447 U.S. 727, 735-36 n. 8 (1980).

Id. at 4574. Accordingly, the federal court's supervisory powers include the authority to remedy and deter serious misconduct by the government in the investigation and prosecution of a criminal defendant.[10] Reversals of convictions under a court's supervisory power, however, must be approached "with some caution." *United States* v. *Payner*, 447 U.S. 727, 734 (1980).

In *Hastings* and *Payner*, the Court reviewed attempts by lower courts to exclude evidence and reverse convictions using supervisory powers. On both occasions the Court held that the courts of appeals should not have reversed the conviction. In *Payner*, key evidence against defendant was seized by the government in an illegal search of a third person's briefcase.

---

[10] The supervisory powers of a court are separate and distinct from alternative sanctions such as a perjury prosecution, administrative discipline, contempt or a civil suit. *See Franks* v. *Delaware*, 438 U.S. 154 (1978); *United States* v. *Cortina*, 630 F.2d 1207, 1210 (7th Cir. 1980).

Government agents broke into a locked briefcase and stole records. Defendant urged that although the illegal search did not violate his personal fourth amendment rights, the Federal District Court was required to exercise its supervisory powers to suppress the evidence against him which was tainted by the theft of the records in order to deter similar misconduct in the future and prevent the judicial system from tacitly acquiescing in such behavior. The Supreme Court disagreed finding the use of supervisory powers unauthorized where the illegal conduct did not violate the defendant's personal constitutional rights. *Payner*, 447 U.S. at 734-35 n. 7, 736 n. 8. *See also, Id.* at 737 n. 9. In *Hastings*, the Seventh Circuit had held that the prosecutor violated defendants' fifth amendment right to remain silent when in summation he commented on their failure to submit a defense. The Supreme Court rejected the use of supervisory powers to set aside the convictions (and remand for retrial). Reversal of otherwise valid convictions, the Court reasoned, was an improper method of punishing the prosecutor or deterring further misconduct. The *Hastings* Court found overwhelming evidence of guilt and concluded that any error occasioned by the prosecutor's argument was harmless.

The *Hastings* Court supplied guidelines for the future use of supervisory powers to reverse a conviction.

> Supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since by definition, the conviction would have obtained notwithstanding the asserted error. Further, in this context, the integrity of the process carries less weight, for it is the essence of the harmless error doctrine that a judgment may stand only when there is no 'reasonable possibility that the [practice] complained of might have contributed to the conviction.' *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963). Finally, deterrence is an inappropriate basis for reversal where, as here, the prosecutor's remark is at most an attenuated violation of

> Griffiin, and where means more narrowly tailored to deter objectionable prosecutorial conduct are available.

Hastings, — U.S. at —, 51 U.S.L.W. at 4574.

The *Hastings* Court emphasized that supervisory powers should be utilized only where more narrowly tailored means for remedying the violation and deterring future conduct would prove sufficient. Examples given by the *Hastings* Court included directing the wrongdoer to show cause why he should not be disciplined, asking the Department of Justice to initiate disciplinary proceedings against a prosecutor if he or she was the offender, or publically chastizing the wrongdoer by identifying him or her in the Court's opinion. *Hastings*, — U.S. at —, 51 U.S.L.W. at 3574 n. 5, Slip Op. at 7 n. 5.

Prerequisite then to reversing a conviction under the supervisory powers, (1) there must be a constitutional injury which is personal to the complaining defendant, (2) the injury must "harm" the defendant in a legally significant way, (3) there must be an injury to the judicial system, (4) the "remedy" selected by the Court to preserve judicial integrity and deter future misconduct may not exceed established limitations on the court's power, and (5) the remedy selected must be narrowly tailored.

Mindful of the Court's admonitions in *Hastings* and *Payner* we decline to reverse the defendants' convictions. None of the governmental activity with respect to the writ of habeas corpus incident violated any protected right of the defendants. *Payner* 447 U.S. at 737, n. 9. Although the prosecutor's actions in obtaining the bogus writ constituted a fraud on the federal judicial system, that fraud, if it did not entrap Zeff Lulgjuraj, was in its effect on defendants' convictions harmless beyond a reasonable doubt. Zeff Lulgjuraj testified at trial, and at no time did he assert entrapment. Although the other defendants did claim entrapment they were not directly

involved in the improper removal of Zeff Lulgjuraj from a prison.

The most serious misconduct here was that of the prosecutor. The ATF agent who posed as a marshall was doing so under the prosecutor's aegis. His future conduct may be deterred by use of all of the sanctions given as examples by the Supreme Court in *Hastings*. Indeed, the District Court held a hearing on why he should not be held in contempt. It concluded that the prosecutor understood what he had done was wrong, that there were mitigating circumstances and that if the District Judge who had been deceived would accept an apology for the misconduct, no further action would be taken. Although we might well have imposed a harsher sanction we do not believe the District Court abused its discretion.[11]

Accordingly, the judgments of conviction are affirmed.

---

[11] In exercising its decision-making functions a court must rely on the representation made to it by the attorneys that come before it. Because many of the matters presented by assistant United States attorneys are presented ex parte (writs of habeas corpus ad testificandum, search warrants, wire tap orders, etc.) it is especially important that the court be able to rely on their statements. Deliberate misrepresentations such as those made by the Assistant United States Attorney to the District Judge who issued the writ attack the very core of the judicial system and cannot be condoned.

LIVELY, Circuit Judge, dissenting.

I respectfully dissent. As I view the case the question presented is whether it is a federal offense to offer or pay a bribe to an officer of the United States for the performance of an act which would violate the laws of a state, but which would violate no law of the United States, and which is totally unrelated to the officer's official duties.

There is no doubt that the defendants engaged in unlawful activity. However, they were indicted and tried for the specific offense of violating 18 U.S.C. § 201(b)(3) (1976). Unlike the majority I see nothing in the language or history of the federal bribery statute of which § 201(b)(3) is a part to indicate that Congress ever intended to make it a federal offense to offer or pay a bribe to a person who happens to be an employee of the United States to violate a state law by actions which have no conceivable relation to the bribee's official duties. I read the 1962 Act as nothing more than a collation and recodification of earlier bribery acts into a single section of Title 18. It made no substantive changes to the provisions now found in § 201(b)(3). I am not convinced that the understanding of the briber rather than the range of official duties of the person bribed determines the applicability of the federal statute.

A.

A federal bribery statute enacted as section 5451 of the Revised Statutes of 1878 provided:

> Sec. 5451. Every person who promises, offers, or gives, or causes or procures to be promised, offered, or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on be-

> half of the United States in any official function, under or by authority of any department or office of the government thereof, or to any officer or person acting for or on behalf of either house of congress, or of any committee of either house, or both houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit, or aid in committing, or to collude in or allow, any fraud, or make opportunity for the commission of any fraud on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be punished as prescribed in the preceding section.

As codified in the Criminal Code of 1909 the bribery statute was contained in sections 117 and 39 which are similar to present-day 18 U.S.C. § 201(c)(1) and § 201(b) respectively. In 1948 the bribery statute, along with all other criminal laws, was placed in Title 18. From 1948 to 1962, 18 U.S.C. § 201 provided:

> § 201. Offer to officer or other person.
>
> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent

> to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

In 1962 Congress cast § 201 in its current form as part of the Bribery, Graft and Conflicts of Interest Act. In the 1962 Act § 201(b) contains the same elements found in the 1878 statute and the 1909 and 1948 codifications, with only minor changes. The legislative history of the 1962 Act reflects primarily the concern of Congress with redefining conflicts of interest of federal officials. However, the Senate Report on the bill which became the 1962 Act, H.R. 8140, states the purpose of that part of the Act dealing with bribery. After discussing the conflicts of interest portions of the Act, the report continues:

> A secondary feature of the bill is the substitution of a single comprehensive section of the Criminal Code for a number of existing statutes concerned with bribery. This consolidation would make no significant changes of substance and, more particularly, would not restrict the broad scope of the present bribery statutes as construed by the courts.

S. Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* [1962] U.S. Code Cong. & Ad. News 3852, 3853. In discussing § 201 in the section-by-section analysis the report summarizes § 201 (b) as follows:

> Subsection (b) makes it unlawful for anyone to bribe or attempt to bribe a public official by corruptly giving, offering, or promising him or any person selected by him, anything of value with intent to influence any official act by him, to influence him to commit or allow any

> fraud on the United States, or to induce him to do or omit to do any act in violation of his lawful duty. The three alternate intents specified in the subsection are in substance the same as those now prescribed in title 18, United States Code, section 201. The subsection expands present law to a degree in its provisions forbidding an offer or promise of something of value from which a public official himself will not benefit but which will be of advantage to another person in whose well-being he is interested.

Id. at 3856-57.

B.

What is now 18 U.S.C. § 201(b) has remained virtually unchanged since 1878. The codifications and amendments have not altered the substance of the federal offense of bribery. The present law is intended to have the broad scope of earlier bribery statutes "as construed by the courts."

The 1878 bribery statute was construed in *United States* v. *Gibson*, 47 F. 833 (N.D. Ill. 1891). The defendant in that case was charged with offering an internal revenue officer money to set fire to a distillery. The officer was entitled to enter the distillery at any time it was open for the purpose of seeing that proper revenue stamps were affixed to all receptacles containing alcoholic spirits. However, he had no other duties with respect to the distillery. The district court quashed the indictment upon finding that "to bribe or induce such an officer to do an act not connected with his line of duty impinges upon no United States law, and does not subject the offender to indictment and punishment in the United States courts." *Id.* at 834. While the revenue officer's right to enter the distillery made him a convenient person to attempt to employ for the purpose of destroying the distillery, this fact did not bring the offer within the federal bribery statute. The court concluded its opinion:

> The bribe offered was for an act entirely outside the official function of the officer to whom, it is claimed, the bribe was offered. The right to enter the distillery was not given him that he might do this, but that he might enter there for the purpose of merely inspecting the articles in the distillery, and hence the act which it was sought to have him accomplish by the inducement offered was in no respect within the duty of this officer. The alleged offers cannot be said to have been made to induce the officer to do or omit to do any act in violation of his lawful duty. It will, of course, be understood that this motion is disposed of solely on the ground that the offense charged was not within the jurisdiction of this court, but is wholly within the cognizance of the state courts.
>
> The motion to quash is sustained.

Id. at 835.

A similar conclusion was reached in *In re Yee Gee*, 83 F. 145 (D.Wash. 1897), where the defendant solicited a government employee to give false translations of Chinese letters and documents which the defendant anticipated would be offered in evidence in a pending criminal case. The interpreter had not been appointed or designated to make the translations, though his duties were to assist customs officers in interpreting and translating from Chinese to English and from English to Chinese. The district court found that it was not a function of his position to make translations in court proceedings and in the absence of a specific appointment to do so, any such activity on his part would not be performed in his official capacity.

The Supreme Court dealt with the bribery provisions of the Criminal Code of 1909 in *United States* v. *Birdsall*, 233 U.S. 223 (1914). The court described the substance of the two sections as follows:

> Section 117 of the Criminal Code (35 Stat. p. 1109), with respect to the acceptance of bribes, provides that

> "whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof" accepts money, etc., "with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby" shall be punished as stated. Section 39 (*id.* p. 1096), as to bribe giving, uses similar language in defining the official relation of the recipient and the character of the action intended to be influenced; adding the words — "with intent to influence him to commit . . . any fraud . . . on the United States, or to induce him to do or omit to do any act in violation of his lawful duty."

Id. at 230. Section 39, referred to in the quoted passage, was substantively identical to § 5451 of the 1878 statute.

It seems clear that the Supreme Court related the final clause of § 39, "or to induce him to do or omit to do any act in violation of his lawful duty," to the requirement that the bribe be offered "with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit . . . ." The final clause did not refer to an act or omission in violation of his general duty to uphold the law, but to his official duties. The Court wrote, "Every action that is within the range of official duty comes within the purview of these sections." *Id.* Only when it is charged that the action sought to be influenced is official action is there a basis for prosecution under the federal bribery statute. The Court explained that official action need not be prescribed by statute, but may be a requirement of the department for which the officer is acting and may be evidenced by established usage as well as written rules. *Id.* at 231.

This court dealt with 18 U.S.C. § 201 under the 1948 Criminal Code in *Blunden* v. *United States*, 169 F.2d 991 (6th Cir. 1948). As has been pointed out, there is no material difference between the final clause of § 201 (1948) and the present § 201(b)(3). In *Blunden* the defendants thought the person to whom they paid money had the authority to release surplus government property to them. In fact, that person, an Army civilian employee, had no control over surplus property, although he had misrepresented his authority to the defendants. Under these circumstances the court found there was no bribery under § 201, though the defendants clearly intended to corrupt a federal employee. The language now found in § 201(b)(3) was not discussed. The court cited two previous Sixth Circuit cases "which . . . held that in order for the offense to exist under the statute it was necessary that the person offering the bribe believe that the employee had the necessary authority and also that the employee possess the actual authority to act or assist in the matter." 169 F.2d at 994. The court then stated:

> The crux of the offense is the intent to influence an *official* decision. The statute requires that the employee be acting for the Government in an "official function" and that the matter in which his decision is to be influenced be "before him in his official capacity."

Id. (Emphasis in original). In a subsequent § 201 case this court distinguished *Blunden* but did not depart in any respect from its holding. *See Krogmann* v. *United States*, 233 F.2d 220 (6th Cir. 1955).

Blunden has been criticized as being too restrictive in interpreting § 201. *See, e.g., Hurley* v. *United States*, 192 F.2d 297, 300 (4th Cir. 1951). *See also Schneider* v. *United States*, 192 F.2d 498 (9th Cir. 1951), *cert. denied*, 343 U.S. 914 (1952), where the result would have been different if

the *Blunden* requirement respecting the authority of the bribery target had been strictly followed. Nevertheless, in each of these cases the bribe was paid to influence a decision or obtain action which violated a duty owed to the United States as employer of the target of the bribe. In *Hurley* v. *United States, supra*, the defendant paid money to an Air Force sergeant attached to an induction center to prevent the defendant's induction into the armed forces. The sergeant to whom the bribe was paid had no authority to prevent an induction legally, though he could do it illegally. The court concluded that the act sought by the briber need not be within the actual authority of the person bribed. Nevertheless, the lawful duty of the sergeant which the defendant wanted him to breach was his official duty to the government of which he was an officer, not to some other entity. Though not within his authority, the illegal act, if performed, would have been injurious to the United States.

In *Schneider* v. *United States, supra*, the defendant paid an Army air base salvage officer to substitute other salvage material for the scrap which he had purchased. The court stated that if any base salvage officer "should fail to prevent or to report an unauthorized removal of government property from the base knowing that such a removal was contrary to law he would fail in his lawful duty. This would be true whether or not he possessed specific authority to sell the property." 192 F.2d at 501 (citation omitted). Since the officer's official duties required him to protect government property, the bribe was offered to cause him to fail to do his duty as base salvage officer. Thus, the court took a broader view of the "authority to act" requirement of § 201 than this court did in *Blunden*. However, the *Schneider* court did not depart from the requirement that the bribe relate to an official function of the target of the bribe:

> The statute itself and the cases construing it or its predecessor make it clear that no violation of the law

> can take place unless the individual bribed or attempted to be bribed is an officer or employee or person acting for or on behalf of the United States or a department or agency thereof, *and that the bribe or the offer is in connection with his line of duty.* The duties of him to whom the offer is made or the bribe given are most pertinent.

Id. at 500 (footnote omitted) (emphasis added). I agree with the holding in *Schneider*. The requirement of *United States* v. *Blunden* that the act sought by the briber be within the actual authority of the person bribed does not apply where the defendant is charged specifically with violating § 201(b)(3). However, in all § 201(b)(3) prosecutions the act sought by the briber must be a violation of some official duty of the person bribed. The act sought must be "within the range of official duty" of the person bribed. *Birdsall*, *supra*, 233 U.S. at 230.

C.

After careful consideration I conclude that the actions of the defendants in the present case did not constitute a violation of 18 U.S.C. § 201(b)(3). Van Hengel had no official duties with respect to Michigan state prisons or their inmates. The fact that the defendants, or at least Gjieli, thought he might have some influence with state prison authorities is immaterial. The bribe must be offered or paid to induce action which violates the lawful duty of the offeree or payee. "Every action *that is within the range of official duty* comes with the purview of these sections." *Birdsall*, *supra*, 233 U.S. at 230 (emphasis added). Neither preventing the escape nor obtaining the release of inmates from Jackson State Prison was within the range of Van Hengel's official duty. The fact that Van Hengel is an ATF agent under a general duty to refrain from criminal and dishonest acts and to uphold the laws of the land is not

enough. He was not paid to do or omit to do any act related to his official duties.

The decision to prosecute the defendants under the federal bribery statute is puzzling in view of the fact that the Michigan State Police were involved in the investigation from the beginning. The endeavor to free Lulgjuraj would have violated Michigan law as set forth in M.C.L.A. § 750.183, "Aiding escape of and rescuing prisoners":

> Any person who . . . shall by any means whatever, aid or assist any . . . prisoner in his endeavor to make his escape [from any jail, prison or like place of confinement], whether such escape be affected (sic) or attempted, or not . . . shall be guilty of a felony, punishable by imprisonment in the state prison not more than 7 years . . .

The State of Michigan has a strong interest in prosecuting anyone who would seek to effect the unlawful release of a person convicted of capital crimes. If the information in this case had been turned over to a Michigan prosecutor I have no doubt that the matter would have been pursued vigorously.

The district court should have granted the defendants' motion for acquittal.

IN THE UNITED STATES DISTRICT COURT
Eastern District of Michigan
Southern Division

UNITED STATES OF AMERICA,
Plaintiff,

v. Criminal No. 80-80529

GJERGJ GJIELI, NICKOLA LULGJURAJ a/k/a NICK LULGJURAJ, and ZEFF LULGJURAJ,
Defendants.

Before The HONORABLE HORACE W. GILMORE

Detroit, Michigan—Friday, November 21, 1980

APPEARANCES:

Mr. John N. Thompson
Assistant U.S. Attorney

Mr. Richard Rossman
Chief Assistant U.S. Attorney

Appearing on Behalf of the United States

ALSO PRESENT:

Mr. James Covert
Special Agent—Alcohol, Tobacco & Firearms

Mr. Robert Van Hengel
Special Agent—Alcohol, Tobacco & Firearms

REPORTED BY:

ELIZABETH A. HIGDON
Official Court Reporter

Detroit, Michigan
Friday, November 21, 1980

THE COURT: United States versus Gjieli, et al.

The jury returned a verdict of guilty as to all three Defendants on two counts. The reason we are here today is because—is for me to inquire about the writ of habeas corpus which was obtained for Zeff Lulgjuraj from Judge Boyle on July 21, 1980. The court in the case clearly shows, and the testimony of Agent Covert shows that this was obtained as a ruse and for the purpose of getting Zeff Lulgjuraj out of jail so it could be shown to Zeff and to Nickola Lulgjuraj and Gjergj Gjieli that they would be able to get him out of jail so they could continue with the investigation of the bribe and conspiracy to bribe case.

Now the record should reflect that I have talked with Judge Boyle, who issued the writ, and she knew nothing about this. I think we better get the facts straight.

The writ was obtained on July 21, 1980, I have it here in front of me, and a petition signed by John Thompson, which says,

> "Now comes the United States of America, by its Attorneys, and respectfully states that Zeff Lulgjuraj, who is now in the custody of the Warden, Sheriff or Jailor in the State Prison of Southern Michigan, that said prisoner is a witness in the prosecution of the above-entitled action," and the above-entitled action is In Re Grand Jury Investigation, "which is set for proceedings in this Court and that in order to obtain the attendance of said prisoner it is necessary that a Writ of Habeas Corpus be issued commanding the appropriate custodian to produce said prisoner in this Court, Federal Building and United States Courthouse, 231 West Lafayette, Detroit, Michigan, Room 842, on Tuesday, July 22, 1980, at one p.m."

That was presented to Judge Boyle of this Court on the 21st of July and Judge Boyle issued the writ of habeas corpus.

Attached to the writ was a motion to seal by Mr. Thompson, which says, "Now comes the United States of America and moves this Court to seal all papers in connection with the above-entitled matter, including the name of the witness, for the reason that the investigation is of a sensitive nature and disclosure could result in serious bodily harm," and Judge Boyle signed an order that the docket entries shall not disclose the name of the person to whom the writ was issued, and that the motion to seal was granted and the order was sealed until the further order of the Court.

Now the testimony in this case showed that there was no intention whatever on the part of the United States Attorney or the investigating officers to bring Mr. Zeff Lulgjuraj back to this Court for the purpose of testifying before the grand jury. The testimony shows that this was a ruse. The testimony further shows that the whole purpose was to get—to show that they could get Zeff Lulgjuraj out of jail.

As I said, I have, since this came up, talked to Judge Boyle, and Judge Boyle informs me that she knew, and I have also learned by conversation with the Chief Assistant United States Attorney, that she knew nothing about this, that she signed this writ of habeas corpus in good faith, thinking that it was for the purpose of bringing this Defendant back to testify before a grand jury.

First, I want to ask for an explanation from the United States Attorney's Office and from the Agents in Charge. By what license do you mislead a United States District Judge to obtain a writ of habeas corpus when you had no intention whatever of doing what is said in the writ, and the second question I have is if you were going to do this, why was not the Judge advised of this so that the Judge could make the decision whether to issue the writ or not for this purpose?

MR. ROSSMAN: If it please the Court, if I may speak first, for the record, I am Richard Rossman, currently the Chief Assistant United States Attorney.

Your Honor, I did not personally learn of this matter until after the writ was signed by Judge Boyle. As soon as I learned of it, I directed that some action be taken to advise the Court of that matter, and it's my understanding that Sam Damren of our office, who is sitting in the back of the courtroom at the present time, was the Assistant Chief of the Criminal Division, and Mr. Thompson's immediate supervisor, did speak with Judge Boyle, but it would have been after the fact, to have her alerted to that matter. I don't believe that anyone if our office except for Mr. Thompson had advance knowledge that there was going to be an attempt to obtain such writ from the Court.

I have spoken to Mr. Thompson subsequent, your Honor. I think it is perhaps best that he speak to the Court regarding his dealings, although I would like to add one last thing. It would be my understanding that unlike state practice, let's say, that the agents from ATF would really have had no responsibility for this whatsoever, that they did not obtain or seek the writ from Judge Boyle. I think that our office would take full responsibility, and I really don't feel that the agents should in any way, from what I understand about procedures, be held accountable for any inappropriate or more serious action that the Court sees here.

THE COURT: Let me say—I want to hear from Mr. Thompson—let me say that I am very surprised about this because, as I have told you and Mr. Rossman, and I will say on the record, Mr. Thompson did an excellent job in the trial of this lawsuit, an absolutely fine job as a lawyer. He was a good advocate, he was well-prepared, he was prepared on the facts, he was prepared on the law, he questioned witnesses well, he was alert on objections, he did an excellent job in cross examination and conducted himself as a top lawyer in the prosecution of this case. Therefore, I am doubly amazed, Mr. Thompson, that this happened. Would you like to explain it?

MR. THOMPSON: Yes, your Honor.

Your Honor, during the course of this particular investigation, there had been discussions as to whether or not Mr. Zeff Lulgjuraj could be removed from the prison. No details were discussed for a couple of days. Basically what happened is Agent Covert checked the records of the Bureau of Alcohol, Tobacco and Firearms and learned that there had been an arson investigation where Mr. Lulgjuraj, I believe it was his restaurant a business place owned by him, and had suffered a fire of rather suspicious origin and was believed to have been an arson. I discussed this with Mr. Covert, and it was my feeling that since the Bureau of Alcohol, Tobacco and Firearms did have jurisdiction to investigate arsons, that this was a matter that could properly be investigated.

Let me back up. It was my belief that under no circumstances would I make any attempt to obtain a writ unless there was some valid—some basis upon which such a writ could have been issued. When I learned that there was in fact an arson investigation that had never been closed, at least not been solved, I felt that this was a basis upon which a writ could legally have been issued. By the time this—the matter reached this point, it was approximately four-thirty, four thirty-five on the afternoon of the 21st. It had been decided that the move would be made on the 22nd. It was felt that the prison officials on the one hand should not be notified because as the agents testified during the trial, we were concerned about the grapevine.

The fact that Judge Boyle was not informed was totally and completely my mistake, my error. It was, as I said, around four-thirty, four forty-five in the afternoon. I rushed the writ down to Judge Boyle, who was at that point in the process of going back on the Bench. She had been in a recess. I had notified her Clerk that I did have a matter that I needed signed right away and that I would be down as soon as it was typed. However, once it was typed and the proposed order to seal it,

when I got down to her courtroom, to her chambers rather, she was then about to go back onto the Bench. I simply left the writ with the motion and a proposed order with the Judge's secretary and indicated that it was urgent and that we needed it signed. I did not—simply my error. I was fully aware that I should have advised the Judge. I will state that I have, on at least one prior occasion, obtained a writ for a person who we did not intend to bring before a grand jury. This was done before Chief Judge Feikens. At that time it was not a rush matter, I had plenty of time, and I did sit down with the Judge and advise him of what in fact I was actually doing, at which point the Judge did sign it.

I am fully aware that I should have advised Judge Boyle. The only thing I can say is what I have said. I was rushing, it was late. I did not do it that afternoon. Why I did not do it the next day, I simply have no explanation for that. I understand that it was a mistake on my part.

THE COURT: Well, I think it was more than a mistake. I think the writ of habeas corpus is certainly, to bring a prisoner to testify, one of the most sacred writs any court can issue, and courts will issue them when there is reason. As I say, I am very surprised you did that and did not advise her, because my observation of your work has been that you do an excellent job. I think it was totally wrong and I want to reprimand you for doing it.

Now Mr. Rossman says that the agents had nothing to do with this, they assume full responsibility. I want to also say that I, as far as I am concerned, I don't want to ever see something like this again in this Court. Of course, this wasn't in this Court, but if at any time you need a writ for whatever purpose, there will have to be an absolutely full disclosure with me, because if it happens before me in the future, there are going to be serious consequences.

MR. ROSSMAN: I can assure the Court in that regard, and let me say also for the record, and in support of Mr. Thompson, that I believe, your Honor, that this was a rare lapse of judgment by Mr. Thompson.

THE COURT: I hope that is the case because I have had great respect for Mr. Thompson as a result of seeing him firsthand the last three weeks, and I hope it's a rare lapse, and I hope it never happens again.

MR. THOMPSON: I can assure you it will not, your Honor.

THE COURT: Now as I told you, I talked to Judge Boyle, I told Judge Boyle I was having all of you here, and that I was going to raise this matter in open court. She asked that when I was finished, that the two agents and Mr. Thompson come to her courtroom, so I will ask you to go down to Judge Boyle's now.

(Proceedings concluded)

CERTIFICATE

I, Elizabeth A. Higdon, do hereby certify that I reported stenographically the proceedings had in the above-entitled cause before the Honorable Horace W. Gilmore, United States District Judge, at the time and place hereinbefore set forth; that the same was thereafter reduced to typewritten form under my supervision; and I do further certify that the foregoing transcript is a full, true and correct transcript of my stenographic notes.

ELIZABETH A. HIGDON
Elizabeth A. Higdon
Official Court Reporter

No. 81-1087

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,

v. ORDER

Gjergj Gjieli,
Defendant-Appellant

Before: LIVELY, Chief Circuit Judge; KENNEDY, Circuit Judge; and WILHOIT,* District Judge.

The Court not having favored rehearing en banc in this case, the petition for rehearing in the matter of Gjergj Gjieli is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman
Clerk

---

* Honorable Henry R. Wilhoit, Jr., United States District Court for the Eastern District of Kentucky, sitting by designation.

Nos. 83-1046 and 83-6087

In the Supreme Court of the United States

OCTOBER TERM, 1983

GJERGI GJIELI, PETITIONER

v.

UNITED STATES OF AMERICA

NICKOLA LULGJURAJ AND
ZEFF LULGJURAJ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioners' convictions should be reversed as a sanction for prosecutorial misconduct that occurred during the investigation of this case and did not prejudice petitioners.

2. Whether a payment to a federal official for the purpose of inducing him to use his influence to help effect the unlawful escape of a state prisoner violates the federal bribery statute, 18 U.S.C. 201.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1046

GJERGI GJIELI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-6087

NICKOLA LULGJURAJ AND
ZEFF LULGJURAJ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a)[1] is reported at 717 F.2d 968.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1983. A petition for rehearing was denied on December 14, 1983. The petition for a writ of certiorari in

[1] "Pet. App." refers to the appendix to the petition in No. 83-1046.

No. 83-1046 was filed on December 22, 1983. The petition for a writ of certiorari in No. 83-6087 was filed on January 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of bribing a public official, in violation of 18 U.S.C. 201(b)(3), and conspiring to commit that offense, in violation of 18 U.S.C. 371. Petitioner Gjieli was sentenced to concurrent prison terms of 15 years on the substantive count and 5 years on the conspiracy count. Petitioner Zeff Lulgjuraj was sentenced to concurrent terms of five years' imprisonment. Petitioner Nickola Lulgjuraj was sentenced to concurrent terms of three years' imprisonment. The court of appeals affirmed, with Judge Lively dissenting in part.

1. Petitioner Gjieli was a bartender at a bar frequented by Robert Van Hengel, an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF). Petitioner Gjieli offered Agent Van Hengel $100,000 "plus the biggest present he had ever received" if Van Hengel could use his "contacts" to help petitioner Zeff Lulgjuraj escape from a state prison in Michigan, where he was serving four life sentences. Pet. App. 2a-3a & n.1. Van Hengel warned Gjieli that "such an offer to a federal agent could get him in serious trouble" (*id.* at 2a), but Gjieli persisted.

Van Hengel reported the offer to his supervisor and subseqently engaged Gjieli in a conversation that was secretly recorded. They discussed a possible trial run in which Van Hengel would show what he was able to do. Gjieli assured Van Hengel that the $100,000 would be "cash on the line." Pet. App. 3a.

After several weeks during which there was no contact between Gjieli and Van Hengel, Van Hengel returned to the bar and was unable to find Gjieli. Van Hengel then consulted with an Assistant United States Attorney, and they decided that some step should be taken to signal Gjieli that Van Hengel was ready to cooperate. The Assistant United States Attorney accordingly presented a request for a writ of habeas corpus ad testificandum to a federal district judge, seeking petitioner Zeff Lulgjuraj's appearance before a grand jury investigating an arson case. The judge issued the writ. Unknown to the judge, there was in fact no such arson investigation in progress and no plan to take Lulgjuraj before a grand jury. Pet. App. 3a-4a.

An ATF agent took the writ to the state prison where Zeff Lulgjuraj was confined and obtained custody of him. A group of agents and United States marshals then took him to a nearby airport where Van Hengel was waiting in an unmarked car. Van Hengel told Lulgjuraj that he should relate the incident to Gjieli: "You tell him we had you out. This was my idea to get you here. Just tell him the guy he talked to in the bar, in DeLuca's, we had you out. Airplanes were here. OK?" Lulgjuraj appeared not to know of Gjieli's offer of $100,000, but Lulgjuraj told Van Hengel that his son, petitioner Nickola Lulgjuraj, would be in touch with Van Hengel. Pet. App. 4a-5a.

Later that day, Van Hengel received a telephone call from Nickola Lulgjuraj. A few days later, he also received a call from Gjieli, and he met with Nickola Lulgjuraj and Gjieli. At those meetings, which were secretly recorded, Nickola Lulgjuraj, Gjieli, and Van Hengel discussed, and Nickola Lulgjuraj and Gjieli then paid, $10,000 in "front money" to Van Hengel and another AFT agent. Approximately two weeks later, Nickola Lulgjuraj delivered $90,000 in cash to Van Hengel. Pet. App. 5a.

2. After petitioners were convicted, the district court held a hearing on whether the Assistant United States Attorney should be held in contempt for having deceived the district judge who issued the writ of habeas corpus ad testificandum (see Pet. App. 34a-39a). After hearing an explanation from the prosecutor and his supervisor, the district court reprimanded the prosecutor, and the prosecutor apologized to the district judge who issued the writ (see *id.* at 22a, 38a). The court of appeals strongly condemned the prosecutor's actions (see *id.* at 22a n.11) and concluded (*id.* at 22a (footnote omitted)): "Although we might well have imposed a harsher sanction we do not believe the District Court abused its discretion."

ARGUMENT

1. Petitioners contend (83-1046 Pet. 6-10; 83-6087 Pet. 5) that their convictions should be overturned because the Assistant United States Attorney and the ATF agents acted improperly in obtaining Zeff Lulgjuraj's temporary release on the writ of habeas corpus ad testificandum. While these actions were inexcusable, it is clear that petitioners are not entitled to relief.

In *United States* v. *Morrison*, 449 U.S. 361 (1981), this Court held that even if a defendant's constitutional rights have been deliberately violated, dismissal of the indictment is "plainly inappropriate" unless there is "demonstrable prejudice, or substantial threat thereof" (*id.* at 365). Here, as the court of appeals noted, "[n]one of the governmental activity with respect to the writ of habeas corpus incident violated any protected right of the defendants" (Pet. App. 21a) — much less their constitutional rights.[2]

---

[2]Petitioner Gjieli asserts, without explaining, that the Assistant United States Attorney's action "most clearly infringed on Zeff Lulgjuraj's residual liberty rights" (83-1046 Pet. 9). Even apart from the question whether petitioner Gjieli can claim a right to relief on this

Moreover, the prosecutor's deception of the district judge did not prejudice petitioners in any way. Petitioners are in the same position they would have been in if federal authorities had, through the cooperation of Michigan state authorities, lawfully obtained temporary custody of Zeff Lulgjuraj for the purpose of exposing the conspiracy. Petitioners could not have complained about such a lawful procedure; yet it would have had precisely the same effect on petitioners as the irregular procedures that were in fact followed here.

The district court, not petitioners, was aggrieved by the prosecutor's actions, and that court responded in a way that it and the court of appeals — without dissent on this issue —deemed appropriate. To reverse petitioners' convictions would give them a wholly unwarranted windfall. See also *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6-7 (footnote omitted) ("deterrence is an inappropriate basis for reversal where, as here, * * * means more narrowly tailored to deter objectionable prosecutorial conduct are available").[3]

---

basis, it is untenable to suggest that a brief release from prison into the custody of officials — the kind of action that would accompany a transfer from one prison to another — invades a protected liberty interest. Compare *Montanye* v. *Haymes*, 427 U.S. 236 (1976), and *Meachum* v. *Fano*, 427 U.S. 215 (1976), with *Vitek* v. *Jones*, 445 U.S. 480, 491-494 (1980).

[3]It is unclear whether petitioners now assert that they were entrapped as a matter of law (see 83-6087 Pet. 5). But petitioner Zeff Lulgjuraj did not claim below that he was entrapped (see Pet. App. 21a), and in view of the fact that federal agents never initiated contact with either Gjieli or Nickola Lulgjuraj, any such claim by them would be insubstantial. In any event, the only action initiated by the federal agents was a signal that they would be able to aid in Zeff Lulgjuraj's escape; they took this action only after Gjieli had spontaneously offered a bribe to Van Hengel, and the government action was followed almost immediately by contacts, and subsequent offers of money, from Gjieli and Nickola Lulgjuraj. Such government action cannot constitute entrapment as a matter of law.

2. Petitioners also assert (83-1046 Pet. 10-11; 83-6087 Pet. 4-5) that their actions did not fall within the federal bribery statute because the bribe was not given "in connection with the federal official's line of duty" (83-1046 Pet. 11). This was also the basis of Judge Lively's dissent; he stated (Pet. App. 23a):

> As I view the case the question presented is whether it is a federal offense to offer or pay a bribe to an officer of the United States for the performance of an act which would violate the laws of a state, but which would violate no law of the United States, and which is totally unrelated to the officer's official duties. * * * I see nothing in the language or history of the federal bribery statute * * * to indicate that Congress ever intended to make it a federal offense to offer or pay a bribe to a person who happens to be an employee of the United States to violate a state law by actions which have no conceivable relation to the bribee's official duties.

Petitioners and Judge Lively, however, misapprehend the charge against petitioners. The indictment charged, and the jury found, that petitioners did "corruptly give, offer and promise * * * One Hundred Thousand Dollars * * * to Special Agent Van Hengel, ATF, a public official, with intent to induce him *to do an act in violation of his duty*; that is, *to use his knowledge, influence and official position* to effect the escape of Zeff Lulgjuraj from the lawful custody of the State of Michigan Department of Corrections." Pet. App. 5a n.4 (emphasis added). Thus, contrary to the suggestions of petitioners and Judge Lively, petitioners were not convicted of bribing Van Hengel to take actions "hav[ing] no conceivable relation to [his] official duties"; they were convicted of bribing Van Hengel to use his official position to help effect Zeff Lulgjuraj's escape. If this were a case in which a public employee was paid to effect a prisoner's escape by methods that could be used by any person,

whether or not he was a public official — force, for example — the issue addressed by petitioners and the dissent might be implicated. But it is not implicated here, because petitioners were convicted of attempting to induce a public official to use his office and his influence to further their objectives.

While it is true, as petitioners assert, that Van Hengel was not directly responsible for keeping state prisoners in custody, petitioners apparently believed that he could use his influence as a law enforcement officer to aid in Zeff Lulgjuraj's escape. As the court of appeals noted, "Van Hengel was approached by [petitioners] because he was a government employee and because they erroneously perceived that he had the power to effect the release of Zeff Lulgjuraj from state prison as a result of that status" (Pet. App. 15a). Indeed, as the court of appeals also noted, and as Van Hengel demonstrated to petitioners, it is not clear that petitioners were necessarily mistaken in this belief (see Pet. App. 5a-6a n.5). But even if they were mistaken, the courts of appeals have consistently ruled that a person who offers a bribe to a public official cannot escape criminal liability by showing that, unbeknownst to him, the official lacked the authority (or was otherwise unable) to do the act that the bribe was intended to induce. See, *e.g.*, *United States* v. *Arroyo*, 581 F.2d 649, 655 n.10 (7th Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *United States* v. *Evans*, 572 F.2d 455, 480-481 (5th Cir.), cert. denied, 439 U.S. 870 (1978); *United States* v. *Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975); *United States* v. *Hall*, 245 F.2d 338, 339 (2d Cir. 1957); *United States* v. *Troop*, 235 F.2d 123, 124-125 (7th Cir. 1956); *Wilson* v. *United States*, 230 F.2d 521, 524-525 (4th Cir.), cert. denied, 351 U.S. 931 (1956); *Hurley* v. *United States*, 192 F.2d 297 (4th Cir. 1951). See also *United States* v. *Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223, 227 n.5 (9th Cir. 1981);

United States v. *Lubomski*, 277 F. Supp. 713 (N.D. Ill. 1967). Any other approach would exempt from the bribery statutes many acts that Congress plainly intended to proscribe.

Judge Lively concluded that bribery could be committed when "the act sought by the briber * * * [is] a violation of some official duty of the person bribed. The act sought must be 'within the range of official duty' of the person bribed" (Pet. App. 31a (citation omitted)). As the indictment shows on its face, the act of which petitioners were convicted satisfies this test. Indeed, it satisfies even the test suggested by petitioner Gjieli himself — "that the bribe or offer be in connection with the federal official's line of duty" (83-1046 Pet. 11). Petitioners' reliance on *United States* v. *Birdsall*, 233 U.S. 223 (1914), is inexplicable; in *Birdsall*, this Court gave the federal bribery statute a broad scope that is clearly sufficient to cover conduct like petitioners' (*id.* at 230-231):

> Every action that is within the range of official duty comes within the purview of these sections. * * * To constitute it official action, it was not necessary that it should be prescribed by statute * * *. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the department and fixed the duties of those engaged in its activities. * * * In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the * * * statutes against bribery.

Similarly, in *Schneider* v. *United States*, 192 F.2d 498 (9th Cir. 1951), cert. denied, 343 U.S. 914 (1952), on which petitioners also rely (83-1046 Pet. 11), the court ruled that

the offense of bribery can be established if the alleged bribe was offered "in connection with [an official's] line of duty" (192 F.2d at 500) or if "the act or omission to which the bribe was directed was within the scope of official conduct" (*id.* at 501). In neither of these cases was a bribery conviction set aside on the ground that the action the payer of the bribe sought to induce was not closely enough related to the official duties of the recipient. Finally, petitioners attempt to rely on *Blunden* v. *United States*, 169 F.2d 991 (6th Cir. 1948); but the court of appeals carefully distinguished its own decision in *Blunden*, explaining that *Blunden* involved a different provision of the federal bribery statute (see Pet. App. 10a-16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

FEBRUARY 1984

DOJ-1984-02